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No. 07-270

IN THE

Supreme Court of the United States

BOARD OF EDUCATION OF THE NEW YORK CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Petitioner,

v.

ELSA GULINO, MAYLING RALPH and PETER WILDS, on behalf of themselves and all other similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

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June 2, 2008

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This supplementary brief is submitted in reply to new points raised by the United States in their Brief as Amicus Curiae.

ARGUMENT

In an amicus curiae brief dated May 23, 2008, the United States has taken the anomalous position that although the Second Circuit did indeed commit the serious and damaging error of law asserted by petitioner, the petition for a writ of certiorari should be denied. The United States' brief expressly reaches the same legal conclusion as that advocated by petitioner, *i.e.*, that "petitioner is not liable under Title VII for complying with a facially neutral licensing regime that limits the universe of potential employees to those who have complied with the State's requirement." U.S. Br. at 9. Nonetheless, the U.S. argues that a writ of certiorari is not warranted in this case because: (1) "The court of appeals' decision does not conflict with any decision by this Court or another court of appeals" (U.S. Br. at 15); (2) "on appeal petitioner appears to have abandoned the argument that an employer's compliance with state licensing requirements does not violate Title VII" (U.S. Br. at 17); and (3) the case's interlocutory posture is not conducive to review (U.S. Br. at 18).

The U.S. is mistaken on each point. Its brief mischaracterizes petitioner's main argument which, although different in emphasis from the U.S's own formulation as to why the court of appeals was in error, is the same in its essential substance. The U.S. also misses the underlying principle that renders the Second Circuit's decision incompatible with the holdings

of other courts of appeals. Finally, declining to review the Second Circuit's decision because of the interlocutory posture of the case would, as set forth by the U.S. itself, place petitioner is an untenable position at trial.

Petitioner argued before the Second Circuit that it could not be found liable under Title VII because State law mandated that it could only hire or retain, and issue New York City licenses to, applicants who passed the State licensing test i.e. that under governing state law a New York City license to be a full-time teacher was tied to the applicant's passing the State licensing test. Indeed, as stated in petitioner's brief submitted to the court of appeals, "Some of the plaintiffs aver that they had received regular New York City teaching licenses, but, because they failed to pass the NTE and/or the LAST those licenses were terminated and they were essentially 'demoted' to the substitute position." Municipal Appellee's Brief, submitted to the Second Circuit, at p. 7. Thus petitioner did argue before the Second Circuit that its role as employer and City-licensor of City teachers is constrained by State licensing laws and in such capacity it should not be subject to liability under Title VII. This position, although formulated differently, is not significantly distinguishable in substance from the U.S.'s own assertion that Title VII "does not expose to liability an employer who gives effect to a state licensing requirement." U.S. Br. at 14.

The U.S. is likewise mistaken in arguing that the Second Circuit decision is compatible with determinations by other circuits holding that Title VII

is not applicable to licensing activity. Regardless of petitioner's separate status as an employer, the conduct for which it has been held potentially liable is that of complying with state licensing law and of denying regular City licenses to teachers who do not meet state licensing requirements. The U.S.'s own enumeration, on pages 9-15 of its brief, of why petitioner cannot be liable under Title VII underscores the error in the Second Circuit's defining petitioner's status as strictly that of an employer rather than as an entity whose employment decisions must comply with the State's licensing mandates. As stated by U.S. Brief at 11-12,

> "The resulting uncertainty [arising from liability faced by employers under the Second Circuit decision] could jeopardize not only the employer, but also the State's interest in enforcing its licensing requirements. . . . [The State's] traditional police power would be ill served by the court of appeals' decision, as some employers might choose not to follow important licensing requirements. . . ."

State-mandated licensing activity, which various circuits have said is not subject to Title VII, may be undermined or compromised where compliance subjects employers to Title VII liability for compliance, or to state sanctions for noncompliance. The Second Circuit holding is not compatible with the determinations of those courts.

Finally, the U.S. argues that certiorari should be denied because of the interlocutory posture of the case. The Brief hypothesizes that the remand may focus not on the validity of the LAST but rather "on whether

petitioner misused the test by imposing adverse consequences on respondents that were *not* required by state law." U.S. Br. at 18 (italics in original). It is clear from the Second Circuit opinion that the main issue on remand will be whether petitioner can validate the LAST, i.e. whether the employer can validate the State's licensing test. Such a trial would place petitioner in an untenable position. As the U.S. recognizes, "[E]ven attempting to try such a case would pose serious practical problems. Defendants bear the burden of proof on the business-necessity defense, . . . but an employer would be ill equipped to shoulder that burden with respect to a state-mandated licensing test . . . ." U.S. Br. at 12.

In short, the U.S. eloquently lays out the case for finding that the Second Circuit erred in finding petitioner to be potentially liable. The Brief further makes clear the jeopardy in which all state licensing schemes are placed by the court of appeals' decision. Petitioner respectfully urges that this Court be guided by that portion of the U.S. Brief that delineates the fundamental unfairness and truly damaging consequences of the Second Circuit determination, rather than by the recommendation against the granting of certiorari, which relies on technicalities and an exaggerated focus on the differing emphasis of petitioner's argumentation.

CONCLUSION

For the reasons set forth, the City respectfully asks this Court to grant its petition for a writ of certiorari.

Respectfully submitted,

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